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*Attorneys for Plaintiff*IN THE UNITED STATES DISTRICT COURT
FOR THE CENTRAL DISTRICT OF CALIFORNIA
WESTERN DIVISION**DONALD LEO MELLEIN,**

Plaintiff,

v.

UNITED STATES OF AMERICA,

Defendant.

Case No. 2:23-cv-07970-RGK-MAR

**OPPOSED FIRST PLAINTIFF'S
EX PARTE APPLICATION FOR
ORDER REQUIRING
DEFENDANT TO FINISH
RESPONDING TO DISCOVERY***(Memorandum of Points and
Authorities Attached; Filed
Concurrently with Declaration of
Joseph Gay and Proposed Order)*

DISCOVERY MATTER

Judge: Hon. Margo A. Rocconi

Discovery Cutoff: Sept. 4, 2024

Pretrial Conference: Nov. 18, 2024

Trial Date: Dec. 3, 2024

1 **PLEASE TAKE NOTICE** that Plaintiff Donald Leo Mellein hereby moves
2 for an order requiring the government to finish responding to Plaintiff's discovery
3 requests.

4 Plaintiff served the bulk of his discovery requests on **April 10, 2024**. In the
5 following months, Plaintiff repeatedly stressed the need to timely respond to those
6 requests. As recently as **July 31, 2024**, the government's document production
7 remained outstanding, even as its attorneys remained confident that completion
8 was imminent. Yet even as they "pushed very hard for an estimated completion
9 date," the FBI (which has assumed responsibility for reviewing and producing
10 responsive documents) has still refused to say when or if it will finish responding
11 to Plaintiff's discovery requests. As of **August 15, 2024**, more than **four months**
12 after Plaintiff served most of his discovery requests, the FBI still has not finished
13 producing responsive documents and will not even commit to finishing its
14 productions before discovery closes on September 4, 2024. The FBI simply plans
15 to wait out the discovery clock and never finish producing responsive documents.
16 That's the same playbook it used in an earlier, related class action lawsuit, *Snitko v.*
17 *United States*, No. 2:21-cv-04405 (C.D. Cal.). In that case, repeated efforts by the
18 plaintiffs and even an order from this Court (*Snitko*, ECF No. 99) were not enough
19 to force the FBI to comply with its discovery obligations. The FBI's conduct
20 deprived the plaintiffs in that case of countless responsive documents, including
21 virtually all emails between government officials about the conduct underlying that
22 dispute. The FBI is on track to do the same thing here.

23 Plaintiff cannot force the FBI to comply with its discovery obligations. The
24 government's own attorneys cannot even do so. Only this Court can. *Ex parte* relief
25 is therefore requested because the FBI refuses to comply with the most basic of
26 discovery requirements—producing documents that it has already agreed to or
27 been ordered to produce. Absent relief, Plaintiff will be denied responsive
28 documents to which he is entitled, which will prejudice his ability to present his

1 claims in this case. He will not have access to responsive documents to use during
2 discovery, or when dispositive motions are due on September 18, 2024, or when
3 trial begins on December 3, 2024.

4 To address this risk of prejudice, this *Ex Parte* Application seeks an order
5 requiring the FBI to comply with its undisputed discovery obligations. Plaintiff
6 seeks an order requiring the FBI (1) to complete its document productions no later
7 than **August 23, 2024**, and (2) to provide a privilege log by **August 26, 2024**. If the
8 government seeks and obtains an extension of the discovery deadlines, Plaintiff
9 asks that the deadlines sought above be set at least ***three weeks*** before the close of
10 discovery. Finally, the Court should make clear that the FBI's failure to comply
11 with the Court's order will subject it to sanctions under Federal Rule of Civil
12 Procedure 37(b)(2)(A).

13 Defendant is represented by Assistant United States Attorneys Jasmin Yang
14 (jasmin.yang@usdoj.gov) and Yujin Chun (yujin.chun@usdoj.gov), Federal
15 Building, Suite 7516, 300 North Los Angeles Street, Los Angeles, California
16 90012, Telephone: (213) 894-8827/0929. Plaintiff orally informed Defendant's
17 counsel of his intent to file this Application, and of the date and substance of this
18 Application, on August 14, 2024, at about 5:00pm PT. Defendant's counsel have
19 stated that Defendant opposes the application.

20 Dated: August 15, 2024

Respectfully submitted,

21 /s/ Joseph Gay

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1 MEMORANDUM OF POINTS AND AUTHORITIES

2 I. INTRODUCTION

3 Despite the need for this Application, there is no dispute here about the scope
4 of the government's discovery obligations. Plaintiff simply seeks responsive
5 documents that the government has already either agreed to produce or that this
6 Court has ordered it to produce. No one disputes that parties must produce
7 documents they have agreed to produce or that they have been ordered to produce.
8 And no one disputes that they must do so within a reasonable time and before "the
9 date by which all discovery is to be completed." Decl. of Joseph Gay ("Gay Decl.")
10 Ex. B at 9 (Order for Court Trial (emphasis removed)). The only questions are
11 whether the FBI (which is reviewing and producing the documents here) will do
12 what everyone agrees it is obligated to do and whether it will be held to account if it
13 does not.

14 Plaintiff served the bulk of his discovery requests on the government on
15 April 10, 2024. At that time, and many times since, Plaintiff reminded the
16 government of the need to expeditiously produce responsive documents before the
17 discovery deadline expires. As recently as July 31, the government's attorneys
18 believed that by the end of that week, they would have a date by which discovery
19 would be complete. Yet even though the government's attorneys "pushed very hard
20 for an estimated completion date," the FBI would not provide one, and so they have
21 recently said that they "will have to ask for extra time to finish the production/likely
22 continue the trial date," suggesting an extension of three months. Gay Decl. Ex. J at
23 35.

24 Plaintiff has stated that he will not oppose any request by the government to
25 extend the discovery deadline, including their proposal to request another three
26 months. But although the government says it "has proposed a modest extension of
27 the discovery cutoff," Gay Decl. Ex. C at 16, it has not yet requested any extension.
28 Nor is there any guarantee that its request, if made, will be granted. Until the

1 government requests and receives more time, it remains obligated to comply with
2 its discovery obligations within the existing deadlines. And even if that request is
3 granted, the government should still be ordered to complete its production within a
4 reasonable time.

5 Left to its own devices, the FBI will not finish producing the documents it is
6 obligated to produce. Those responsive documents will not be available to Plaintiff
7 to use during the discovery period that ends on September 4, 2024, when
8 dispositive motions are due on September 18, 2024, or when trial begins on
9 December 3, 2024. Gay Decl. Ex. A at 6 (Scheduling Order). To avoid that clear
10 prejudice, Plaintiff seeks an order requiring the FBI to comply with its undisputed
11 discovery obligations and to finish producing the documents it has agreed to or
12 been ordered to produce.

13 **II. BACKGROUND**

14 **A. Factual Background**

15 This case is about Plaintiff's 110 one-ounce gold coins that went missing,
16 including 63 coins that remain missing today. Plaintiff Don Mellein, a retired civil
17 servant in Los Angeles, stored 110 gold coins and other valuables in a safe-deposit
18 box he rented from U.S. Private Vaults (USPV) in Beverly Hills. Second Am.
19 Compl. ¶¶ 2, 13, Dkt. 94. The coins and other valuables, part of Don's retirement
20 savings, were secure in the box for several years, until the FBI raided USPV in
21 March 2021 and "end[ed] up with custody" of Don's box and hundreds of other
22 boxes. *Id.* ¶¶ 8, 36–37, 52. The government then illegally searched the contents of
23 each box as part of a plan to civilly forfeit every box worth more than \$5,000. See
24 generally *Snitko v. United States*, 90 F.4th 1250 (9th Cir. 2024).

25 After the government abandoned its effort to forfeit Don's property, it
26 returned the other valuables from his box on June 14, 2021, but not his gold coins.
27 Gay Decl. Ex. D at 18. According to records finalized after the fact, the
28 government had not seen Don's gold coins when it searched his box in March

1 2021, and it only discovered 37 of them, still inside the box being kept in the
2 general evidence room, on June 14, 2021. Gay Decl. Ex. E at 20 (FD-302 dated
3 June 15, 2021). At some point, that changed without explanation to 47 coins. Gay
4 Decl. Ex. F at 22. After keeping the coins secret for over five months (and forcing
5 Don to file an earlier lawsuit to recover the coins), the FBI eventually agreed to
6 return those 47 coins in December 2021. *Id.*

7 Plaintiff then filed this lawsuit to be made whole for the 63 gold coins that
8 are still missing.

9 **B. Plaintiff's Discovery Requests**

10 On April 8, 2024, Judge Klausner entered a scheduling order setting the
11 discovery cut-off date for September 4, 2024. Gay Decl. Ex. A at 6. That same day,
12 he entered the Order for Court Trial requiring that “[a]ll discovery shall be
13 complete by the discovery cut-off date.” Gay Decl. Ex. B at 9.

14 On April 10, 2024—two days after the scheduling order issued—Plaintiff
15 served his primary set of discovery requests. Gay Decl. Ex. G at 24. In doing so,
16 Plaintiff noted the Scheduling Order did not give us the “luxury of rolling
17 productions,” and asked that the government reach out “as soon as possible” if it
18 would not be able to produce the documents by the May 10, 2024, due date for the
19 responses. *Id.*

20 On May 10, 2024, the government responded to the discovery requests but
21 did not produce any documents. Gay Decl. Ex. H at 27. Instead, the government
22 said it “anticipate[d] … doing a rolling production” beginning in about two weeks.
23 *Id.* In response, on May 15, Plaintiff again noted the need for timely productions
24 and asked if May 28 and June 7, 2024, would be enough time to produce the
25 documents and privilege log, respectively. *Id.* The government did not respond.
26 Gay Decl. ¶ 11.¹

27 ¹ The government’s May 10 discovery responses also objected to certain
28 discovery about other boxes with missing or misplaced property. Plaintiff began the
(continued...)

1 Plaintiff continued to press the issue over the ensuing months:
2 May 20, 2024: During a telephonic meet-and-confer, Plaintiff's counsel
3 again emphasized the need for the FBI to promptly produce its documents.
4 Defendant's counsel responded that non-email documents would be produced by
5 the end of the week and that they hoped to know more about emails the week after.
6 Gay Decl. ¶ 12.

7 June 7, 2024: Plaintiff's counsel emailed Defendant's counsel to emphasize
8 that "we need production to be completed soon," and to request a date by which the
9 government would complete its productions. Gay Decl. Ex. I at 31–32. Plaintiff's
10 counsel requested a Rule 37-1 conference if the government was unable to commit
11 to a reasonable production deadline. *Id.* The government did not respond. Gay Decl.
12 ¶ 13.

13 June 14, 2024: Plaintiff's counsel again asked about the timing of the
14 government's productions and again requested a Rule 37-1 conference. Gay Decl.
15 Ex. I at 31. The government did not respond. Gay Decl. ¶ 13.

16 June 21, 2024: During a conference call, Plaintiff's counsel again
17 emphasized the need for the government to timely produce its documents. The
18 government's counsel explained that they did not have access to or control over the
19 documents or how quickly the FBI reviews and provides them. Gay Decl. ¶ 14. In a
20 follow up email later that day, Plaintiff's counsel again raised the issue about the
21 FBI's production. Gay Decl. Ex. I at 29–30. Plaintiff's counsel asked the
22 government to provide a statement of the government's position as part of the
23 request for a pre-motion telephonic conference under Section 1.b.ii of this Court's
24 discovery procedures. *Id.* The government did not respond. Gay Decl. ¶ 15.

25 _____
26 process of meeting and conferring about that dispute within a few days and filed a
27 motion to compel by June 18, 2024. Dkt. 92. The Court granted that motion on July
28 31, 2024. Dkt. 99. As of August 14, 2024, the government has not produced (and
has not started working on) any documents that were the subject of the Court's July
31, 2024, Order.

1 June 27, 2024: Plaintiff's counsel re-sent the language required by Section
2 1.b.ii of this Court's discovery procedures and again asked the government to
3 provide a statement of the government's position. Gay Decl. Ex. I at 29. The
4 government responded within minutes that the FBI would begin its rolling
5 production the next week. *Id.* Given that assurance, and with the understanding that
6 the FBI was on track to comply with its discovery obligations, Plaintiff did not
7 begin motion practice at that time. Gay Decl. ¶ 16. The FBI began rolling document
8 productions during July 2024. *Id.* ¶ 17.

9 July 31, 2024: During an in-person discussion following a deposition,
10 Plaintiff's counsel again asked when the FBI would complete its document
11 productions, given that the discovery cut-off date was nearing. Defendant's counsel
12 responded that they expected to have an estimated completion date by Friday,
13 August 2. Gay Decl. ¶ 18.² No estimated completion date was provided. *Id.*

14 August 5, 2024: Plaintiff's counsel again emailed to emphasize the need for
15 the FBI to complete its document productions within a reasonable time and before
16 the discovery cut-off date. Gay Decl. Ex. J at 36. Defendant's counsel responded
17 that they had "pushed very hard for an estimated completion date," but that the FBI
18 would not provide one. *Id.* at 35. Instead, the government said it "will have to ask
19 for extra time to finish the production/likely continue the trial date," suggesting a
20 three-month extension. *Id.* Plaintiff's counsel responded that they would not oppose
21 a motion to amend the scheduling order, but that until such a motion was granted,
22 Plaintiff would have to proceed under the current schedule. *Id.* at 34.³

23

² A lawyer from the FBI's Office of General Counsel who is stationed in Los
24 Angeles also attended the deposition and was present during the subsequent
25 discussion about the FBI's document productions. He did not contradict the
26 Assistant U.S. Attorney's expectation that a timeline from the FBI was imminent.
27 Gay Decl. ¶ 18.

28 ³ On August 14, 2024, at about 4:00pm PT, the government's counsel relayed
information from the FBI indicating that it might be able to finish one set of
productions by next Friday, August 23: the documents the government agreed to
(continued...)

1 As of the date of the filing of this memorandum, the government has still not
2 moved to amend the scheduling order.

3 **III. ARGUMENT**

4 **A. The FBI should be ordered to finish responding to discovery.**

5 Plaintiff seeks only to require the FBI to do what it is already required to do.
6 The government has already agreed to provide documents in response to certain
7 requests for production. And it has already been ordered to produce certain other
8 documents by this Court. Dkt. 99. The Federal Rules of Civil Procedure,
9 meanwhile, already require the government to “specify the … end dates of the
10 production” and provide documents within a “reasonable time.” Fed. R. Civ. P.
11 34(b)(2)(B) advisory committee’s note to 2015 amendment); *see Sarieddine v.*
12 *D&A Distribution, LLC*, No. 2:17-cv-2390, 2018 WL 5094937, at *4 (C.D. Cal.
13 Apr. 6, 2018) (“fail[ure] to specify the time for production” violated rules). And the
14 Order for Court Trial already requires, at a minimum, that such productions “shall
15 be complete by the discovery cut-off date” on September 4, 2024. Gay Decl. Ex. B
16 at 9.

17 The only question is whether the FBI will comply with these undisputed
18 obligations: Will it finish its document productions as required, or will it—yet
19 again—simply run out the clock on the discovery period? *See, e.g.*, Joint Stipulation
20 ¶ 13, *Snitko v. United States* (“*Snitko*”), No. 2:21-cv-04405, Dkt. 109 at 5 (C.D.
21 Cal.) (explaining that FBI would not finish producing responsive documents before
22 trial briefs were due). It’s a question that should not need asking. Discovery
23 obligations are not optional. Courts therefore regularly set deadlines to finish
24 producing documents when parties will not do so on their own. *See, e.g.*, *Altair*
25 *Instruments, Inc. v. Telebrands Corp.*, No. 2:19-cv-08967, 2020 WL 6106821, at *2

26 provide in response to Plaintiff’s April 10, 2024 discovery requests. The FBI,
27 however, has not even **started** reviewing documents in response to the Court’s July
28 31, 2024 Order compelling discovery **or** Plaintiff’s June 28, 2024 discovery
requests. Gay Decl. ¶ 5.

1 (C.D. Cal. July 10, 2020) (granting *ex parte* application and requiring documents to
2 be produced within three days due to “impending discovery cut-off” and scheduled
3 30(b)(6) deposition); *City of Colton v. Am. Promotional Events, Inc.*, No. 09-cv-
4 01864, 2011 WL 13224072, at *2 (C.D. Cal. May 26, 2011) (ordering documents to
5 be produced within five days). This Court should do the same here and set a firm
6 deadline for the FBI to complete its discovery obligations within a reasonable time
7 before the close of discovery.

8 Such an order is especially appropriate here because the FBI has already
9 benefited from nearly identical foot-dragging in the *Snitko* case. The plaintiffs there
10 spent months seeking to have the government commit to timely producing
11 responsive documents. *See Ex Parte Application 5–12, Snitko*, ECF No. 95
12 (detailing efforts); Order 2–3, *Snitko*, ECF No. 99 (same). This Court declined to
13 set a firm deadline for the government’s document productions because the
14 government represented that it would substantially complete its discovery
15 obligations within a few days. *Id.* at 4. To ensure compliance, however, the Court
16 ordered the government to provide a status report about its progress soon
17 afterwards. *Id.* at 5. Despite those efforts by the plaintiffs and this Court, the
18 government never finished producing responsive documents. *See, e.g.*, Joint
19 Stipulation ¶ 13, *Snitko*, ECF No. 109 at 5 (observing that, despite imminent trial
20 briefing deadline, videos relevant to the FBI’s search of about 90 boxes and written
21 documents relevant to about 56 boxes had not been produced). The FBI also did not
22 produce essentially any of the email communications between the government
23 officials who planned and executed the conduct at issue there, despite agreeing to
24 do so. Gay Decl. ¶ 20.

25 The FBI should not be permitted to repeat that intransigence here. It has
26 already had four months to produce responsive documents, and there is no reason it
27 cannot finish that production in short order. The Court should therefore order the
28 FBI to complete its production by August 23, 2024, and to produce a privilege log

1 by August 26, 2024. In the event the government seeks and obtains an extension of
2 the discovery deadlines, the FBI should be required to complete its productions and
3 provide its privilege log at least three weeks before any new discovery cut-off date.
4 The Court should also make clear that the failure to comply with its order will be
5 subject to sanctions under Federal Rule of Civil Procedure 37(b)(2)(A).

6 **B. *Ex parte* relief is warranted.**

7 Plaintiff meets the requirements for *ex parte* relief. “A party seeking *ex parte*
8 relief must demonstrate: (1) the moving party is without fault in creating the crisis
9 that requires *ex parte* relief or the crisis occurred as a result of excusable neglect;
10 and (2) the moving party’s cause will be irreparably prejudiced if the underlying
11 motion is heard according to regular noticed motion procedures.” *Altair*
12 *Instruments, Inc.*, 2020 WL 6106821, at *2.

13 First, Plaintiff played no part in creating the need for this Application.
14 Plaintiff served most of his discovery requests within days of the Scheduling
15 Order’s entry. Gay Decl. ¶¶ 2, 10. For the documents the Court ordered the
16 government to produce, Plaintiff began the process for seeking a motion to compel
17 within days of the government’s objections and responses. *Id.* ¶ 10. Meanwhile,
18 over the past several months, Plaintiff has repeatedly—at least 10 times—reminded
19 the government of the discovery deadline and emphasized the importance of timely
20 productions. *See supra* Section II.B. When Plaintiff indicated that motion practice
21 would be necessary, the government did just enough to create the impression that it
22 would comply. See Gay Decl. ¶¶ 15–16. Both Plaintiff’s and Defendant’s counsel
23 have “pushed very hard” to get the FBI to say when it will finish its productions.
24 Gay Decl. Ex. J at 35. And even as late as August 5, 2024, Plaintiff understood the
25 government was on track to complete its productions. This Application results from
26 the FBI’s unilateral decision to disregard its discovery obligations and nothing else.

27 Second, Plaintiff will be irreparably prejudiced if the requested relief is not
28 granted. Plaintiff has already been required to conduct several depositions without

1 the full universe of responsive documents. Gay Decl. ¶ 18 & Ex. I at 31. With the
2 discovery cut-off about three weeks away, it now appears that the FBI will never
3 provide the full universe of documents, let alone with enough time for Plaintiff to
4 notice any depositions that the remaining documents may reveal to be necessary.
5 The FBI's unwillingness to finish producing documents before the close of
6 discovery also means that Plaintiff may be required to brief dispositive motions
7 (due September 18) and proceed to trial (scheduled for December 3) without the
8 responsive documents to which he is entitled. That would severely prejudice his
9 ability to present his claims. *Ex parte* relief is therefore appropriate to ensure that
10 Plaintiff receives all the responsive documents to which he is entitled before
11 discovery closes. *See, e.g., City of Riverside v. Greyhound Lines, Inc.*, No. 16-cv-
12 796, 2017 WL 11632085, at *3 (C.D. Cal. May 16, 2017) (finding *ex parte* relief
13 justified due to impending depositions and upcoming discovery cut-off); *Martin v.*
14 *City of Barstow*, No. 13-cv-132193, 2015 WL 12743593, at *2 (C.D. Cal. May 5,
15 2015) (finding *ex parte* relief justified given "impending discovery cutoff"); *Altair*
16 *Instruments, Inc.*, 2020 WL 6106821, at *2 (*ex parte* relief justified given
17 "impending discovery cut-off" and pending deposition).

18 **IV. CONCLUSION**

19 For these reasons, the Court should order the government to (1) complete its
20 document productions no later than **August 23, 2024**, or at least **three weeks** before
21 the close of any extended discovery period; and (2) provide a privilege log by
22 **August 26, 2024**, or at least **three weeks** before the close of any extended discovery
23 period. The Court should further provide that the government's failure to comply
24 with that order will subject it to sanctions under Federal Rule of Civil Procedure
25 37(b)(2)(A).

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1 Dated: August 15, 2024

Respectfully submitted,

2 /s/ Joseph Gay

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